Lord Justice-Clerk—This is a short matter, and I think simple in its result. The father lives with his lunatic daughter and wife, and receives wages to the amount of £27 a-year and an allowance from his master; and further, as has been proved in the case, is capable of supporting himself. At the date of his wife's application for relief he was on the eve of acquiring a residential settlement in the parish of Hoddam, and then for the first time, and under no change of circumstance, the parochial board of Hoddam, at the request of the mother, gave him an allowance of £8 a-year, which brings the father's income to £35 a-year. How far that is a proper allowance is a question which I think the parochial board could best judge, but the peculiarity of this case is that the effect of this payment, if the argument on the general legal question is correct, is to lay the burden of bearing the charge on Carlaverock, the birth settlement of the pauper. Now, I do not think that under the circumstances it was sufficiently proved that the father was a proper object of parochial relief in respect of his imbecile daughter, and it seems to me that the parochial board have not properly applied their minds to the question. I am very far from saying that there could have been any design on the part of Hoddam to increase the burden on Carlaverock, but if we find—what is perfectly consistent with the proof in the case—viz., that it is not sufficiently established that the father was incapable of supporting his lunatic daughter, and that therefore he was not a proper object of relief, the burden will fall on Hoddam, who made the advances under such circumstances. On the second point there is no question. The settlement of the lunatic was beyond doubt in the parish of Hoddam, if the father had acquired a settlement at Hoddam. The case of *Milne* v. *Henderson* is conclusive on the point. According to the authority of that case, Hoddam is the settlement against which the relief is to be charged, and there is no necessity to go to her former settlement. There were some conflicting decisions on the matter before this case, which was meant to fix once and for all the rule. However, I propose, without going further into this point, to simply find that it has not been properly established that the father here was at the date of the relief a proper object of parochial relief.

Lord Young—I am of the same opinion. James Hunter is certainly not a pauper. He resides industrially now in the parish of Hoddam, and has been industrially resident there as an able-bodied man since Whitsunday 1874. Now, it may certainly be, according to authority, that he is entitled to some assistance in respect of his daughter's sad state, and if he is now or was at any other time since Whitsunday 1879, then Hoddam is the parish to give the assistance. We find that he is not a pauper, and at Whitsunday 1879 he resided at Hoddam industrially for five years, and for two years more; and therefore if he is entitled to assistance, Hoddam is the parish which will be liable. But then a few months before Whitsunday 1879 the parish of Hoddam advanced about £8 a-year, and it is said for them that for this assistance Carlaverock is liable, because five years of industrial residence had not been completed at January 1879, and certainly this might raise some question for the period elapsing between January and Whitsunday. Surely it is almost foolish to raise a question of this kind. Moreover, I agree with your Lordship in holding that it is not proved that in January 1879 any change had occurred in the father's circumstances. On the contrary, he was better off than before, his wages having been raised, and thus nothing in the evidence to show that he had any claim to this exceptional assistance. It may be that we should not have interfered in any way with the Parochial Board of Hoddam, but when they make advances under such circumstances as have occurred, and then appeal to the parish of Carlaverock, I am not satisfied on the evidence that such an appeal was in the circumstances justified. This, however, is not of paramount importance, because in accordance with the case of *Milne*, whenever assistance is given to a man who is not a pauper in respect of the mental condition of one of his family, the burden of such assistance is to be borne by the parish of settlement at the time, and therefore the defender's counsel in argument conceded that any such exceptional assistance given before a residential settlement had been acquired at Hoddam would have to be borne by Carlaverock, while any given after the five years' residence at Hoddam would, in accordance with the decision of *Milne*, have to be borne by the parish in which the father was so industrially resident.

Lord Craighill—I concur in your Lordships' conclusions and reasons for such conclusions.

The Court found that the pursuer had failed to prove that, at the time when the advances libelled were made, James Hunter, father of the lunatic, was a proper object of parochial relief, and therefore sustained the appeal and assoilzied the defender.

Counsel for Appellant (Defender)—Trayner—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.
Counsel for Respondent (Pursuer)—R. Johnstone—Lang. Agents—Smith & Mason, S.S.C.

Wednesday, February 23.

SECOND DIVISION.

SPECIAL CASE—GILLIES *v.* GILLIES' TRUSTEES.

Settlement—Trust—Clause of Forfeiture—Casus improvisus.

By trust-disposition and settlement a truster directed his trustees to make certain provisions for his widow, and to hold the capital of the residue of his estate for the purpose of dividing it among the issue of his children *per stirpes*, the respective shares to be paid over as the issue of the said children respectively attained the age of twenty-one. He further declared that if any of his children should repudiate the above provisions, the child or children so repudiating, and their issue, should forfeit all interest in the settlement in favour of the child or children and their issue abiding by it. He left a widow, one son (who survived his father a

month, dying without issue), and one daughter. The widow and daughter (on majority) repudiated the provisions made for them by the deed, and resorted to their legal rights. Founding on the clause of forfeiture they claimed the whole residue of the estate as intestacy. *Held* that the state of circumstances that had occurred was not contemplated by the deed; that the clause of forfeiture being accordingly inapplicable must be left out of view; but that in order to give effect to the truster's intention the trustees were still bound to hold the dead's part for the possible children of the daughter.

Robertson Gillies, silk mercer, George Street, Edinburgh, died on the 12th October 1871 leaving a trust-disposition and settlement, dated 26th January and recorded in the Books of Council and Session 16th October 1871, in which he conveyed to James Reid and others, as trustees, his whole estate for certain purposes, which, shortly stated, were—1st, For payment of his debts, funeral expenses, and the expenses of the trust; 2d, for payment of an annuity and certain other provisions to his widow; 3d, for payment of various legacies and annuities to relatives and friends of the truster. By the 4th purpose he directed the capital of the residue of his estate to be held by his trustees for the purpose of being divided among the issue of his children *per stirpes*, the respective shares to be paid over as the issue of the said children respectively arrived at the age of twenty-one. He further directed an allowance to be made from the income of the said residue to his children Thomas James Gillies and Mary Margaret Gillies, during their respective lives, the remainder of the income of the said residue to be accumulated along with the capital and applied in the same manner as the capital. He further imposed on his trustees powers to make, in their discretion, certain advances from the capital of the said residue to his children. The said trust-disposition also contained the following declaration:—"And I declare that if any of my said children shall repudiate the provisions hereby made for and left to them, the child or children so repudiating the same, and the issue of such child or children, shall forfeit and lose all right and interest whatever under these presents, and in the estates hereby conveyed; and the said provisions hereby made for and left to the said child or children so repudiating, and his, her, or their issue, shall pass entirely to and be held exclusively for my other child or children abiding by or not repudiating these presents, and their issue, in the same manner and to the same effect as if the said provisions also had been made for and left to the said child or children abiding by or not repudiating these presents, and their issue, alone." The deceased was survived by his widow Mrs Sarah Gillespie or Gillies, and by two children, both of whom were in minority at the time of his death, viz., a son, Thomas James Gillies (who survived his father only about a month), and a daughter, Miss Mary Margaret Gillies. His estate was entirely moveable. There was no marriage-contract between the deceased and his wife, and on her husband's death the latter claimed her legal rights, repudiating the provisions made for her in the trust-disposition, and received from the trustees one-third of her husband's free moveable estate as *jus relictæ*. The daughter, Miss Mary Margaret Gillies, attained majority in June 1880, and thereupon intimated her intention to repudiate the provision of the deed and resort to her legal rights. In these circumstances questions arose as to whether the trustees were entitled to part with the whole or any part of the residue of the trust-estate to the daughter and widow of the truster, who made a joint claim for the whole thereof. They had settled between themselves in what proportions they should divide the same, and had agreed to give the trustees a discharge for the whole residue. The daughter maintained that she was entitled to repudiate her father's settlement and to claim her legal rights, which consisted of a right either to the whole of the legitim fund due from her father's estate, in view that her brother must be considered as having accepted the provisions in his father's settlement, or one-half of the said fund, in the view that the right to legitim vested in him. She further maintained that intestacy had occurred with regard to the free residue of the dead's part of her father's succession after providing for the legacies and annuities mentioned in the third purpose of the settlement, and that she was entitled now to payment of the whole, or otherwise to payment of one-half, of the said free residue in her own right, and to two-thirds of the other half as next-of-kin of her deceased brother, the remaining one-third falling to his mother in terms of the provisions of the Intestate Moveable Succession (Scotland) Act 1855. The widow maintained that intestacy having supervened as regards the residue of the dead's part, one-half of the said residue vested in her said son, to one-third whereof she was entitled in respect of the provisions of sec. 4 of that Act. The mother and daughter together maintained that they were entitled to any share of his father's estate that might be said to have vested in the deceased son. As legitim or otherwise they claimed, as above, the share destined to his issue as intestate succession of the said Robertson Gillies. On the other hand the trustees maintained "that they are not entitled or bound to part with the residue of the said trust-estate, at all events not without judicial authority; they maintain, *inter alia*, that the forfeiture of the share originally destined to any issue that may be born to the said Mary Margaret Gillies in favour of the issue of other children of the testator having failed, they are bound in the due administration of the trust to retain at all events the unexhausted portion of the dead's part for behoof of any children that may be born to the said Mary Margaret Gillies."

In these circumstances, then, the parties agreed to submit this Special Case to the Court, the widow and daughter appearing as the first parties, and the trustees as the second parties in the case. The questions which they proposed for the opinion and judgment of the Court were—"(1) Are the parties of the first part entitled to have now paid over to them the whole remaining residue of the estate of the deceased Robertson Gillies? (2) Are the parties of the second part entitled or bound to retain the whole or any part of the residue of the said estate for behoof of any issue that may be born to the said Mary Margaret Gillies? and if a part, what part?"

Argued for the first parties—The truster con-

templating the contingency of his children's repudiation, made a special provision in regard thereof, which falls to be construed strictly. In point of fact the contingency occurred, and therefore, on a sound construction of the clause of forfeiture, intestacy must be held to have followed.

Authorities—*M'Murray* v. *Govan and Others.* 27th February 1852, 14 D. 1048; *Blackwood* v. *Blackwood's Trustees*, 11th June 1833, 11 Sh. 699.

Argued for the second parties—In spite of the clause of forfeiture, the leading provisions of the will, as indicating the main object of the testator, fall to be given effect to. As regards the clause of forfeiture, a *casus improvisus qua* that clause had occurred, there being no issue born to the daughter, and therefore it was a nullity, and must be treated as such.

Authorities—*Downie, &c.*, 10th June 1879, 6 R. 1013; *Smith and Another*, June 13, 1877, 4 R. 876; *Fisher* v. *Dickson*, 24th November 1831, 10 Sh. 55, and 1st July 1833, 6 W. & S. H. of L. Reps. 431; *Wilson* v. *Gibson*, 30th June 1840, 2 D. 1236, 15 F.C. 1330; *Special Case—Lindsay's Trustees*, 14th December 1880, 18 Scot. Law Rep. 199.

At advising—

Lord Justice-Clerk—Though this case presents somewhat of an apparent puzzle, I think that there is really no very great difficulty in it, because I cannot think that on a sound construction of the testator's whole words here the result sought by the daughter is sound. Taken shortly, the case is as follows:—These trustees have certain duties to perform under the trust, in virtue of which they hold the dead's part of the testator's estate, the remainder being carried off by the legal claims of the mother and daughter. The question is, how is the fund to be distributed? They find no beneficiaries at present in existence, because the son, who had a claim, has died without issue, and the mother and daughter have repudiated and resorted to their legal rights, so that the result is that the trustees under the deed hold the estate only for one possible class of beneficiaries, *i.e.*, the issue of the repudiating daughter. As to the daughter herself, she is out of the question. She is not a beneficiary. She has no rights, and she stands as if she had never been in the deed; but her issue are written in the deed, and therefore it is for them that the trustees hold in terms of the deed. But then the daughter says she is entitled to say that her issue, if she ever have any, shall not succeed, because she has repudiated her rights, and that such repudiation extends to them. Now, I am clearly of opinion that the daughter cannot open her lips on the subject. She has no claim whatever upon any part of the trust-deed, and therefore this is a sufficient answer to the whole case. I decline to notice what the effect of the daughter's repudiation may be, because she is out of the case. It is quite true that if we read the clause of forfeiture by itself we should have to hold that the daughter had actually forfeited for her issue as well as for herself, but we are bound to seek the true object of the clause, and the words which follow disclose for whose benefit it was that the clause of forfeiture was inserted in the deed.

It is plain from these words that the party repudiating was to be divested at the expense of the party who did not repudiate. Because, however, it happens to have turned out that there is no interest protected by the deed to be benefited by the forfeiture, it is clear that the circumstances contemplated have not emerged so as to give the clause its operation, and we have the same result as was reached in the case of *Wilson* v. *Gibson*. If we were to give effect to the daughter's contention we should be going outside the obvious intention of the clause of forfeiture. It has simply become inoperative, owing to certain circumstances not emerging, and the daughter has no title to found on it. The trustees, in short, hold for the possible issue of the daughter, the clause of forfeiture having failed in respect that no legitimate interest has been provided for by the deed in favour of which the forfeiture could operate.

Lord Young—On the question which is before us the case comes to a clear point. There are only three beneficiaries or sets of beneficiaries in the will, viz., the widow, the children, and possible grandchildren of the testator. The widow and children have put themselves out of the case by repudiation—that is to say, the widow and daughter have certainly done so—and as the brother died immediately after his father, his legal representatives may put him out of the will too; for I think that if a child dies in nonage, not having adopted such a settlement as this, his right of legitim is not affected; and therefore with respect to two out of the three beneficiaries they are out of the case. They have taken with them two-thirds of the testator's estate, which leaves one-third to be divided as dead's part. Now, under the provisions of the will the trustees are to hold the funds for behoof of the beneficiaries during minority, and are to give them a share of the fee on their attaining majority, and there is nothing to interfere with such a provision unless it be the clause of forfeiture; and really the main question comes to be, whether the daughter repudiating the will is entitled to plead such repudiation to the effect of excluding her own issue? I am clearly of opinion, and on the same grounds as your Lordship, that she is not. The provisions for the grandchildren of the testator are quite effectual but for the clause of forfeiture. It was admitted in argument that the circumstances which have occurred are a *casus improvisus*, and therefore the result is, practically, that if the provisions are good and effectual except with reference to a clause of forfeiture which has no application to the existing circumstances, then the provision is good and effectual in the circumstances which have emerged. It was conceded that no one could plead it except the daughter, but I think that the meaning of the clause was to give what the repudiating child forfeited to another who did not repudiate. If this never happened, then the clause never came into operation. It was never meant to lead to intestacy, and if we were to give it such a character we should be denying effect to the will of the testator. And therefore, on the whole matter, I am of opinion that (1) the clause of forfeiture is not pleadable by the daughter; and (2) that it is not applicable to the case which was *improvisus;* and therefore I think that the second question should be answered in the affirmative to the

effect that the trustees are entitled to hold half of the residue for behoof of the possible children of the daughter. There is one point on which a question may arise hereafter. There have been accumulations going on for the last ten years. There may be grandchildren born, and if there are they will eventually get the income. But, on the other hand, the daughter may remain unmarried till twenty-one years, when the Thellusson Act would apply and intestacy arise, and the daughter would get the income if she has no children.

Lord Craighill concurred.

The Court pronounced the following interlocutor:—

"Find, in answer to the first question, that the parties of the first part are not entitled to have now paid over to them the whole residue of the estate of the deceased Robertson Gillies; and in answer to the second question, that the parties of the second part are entitled and bound to retain, for behoof of any issue that may be born to Mary Margaret Gillies, and to be administered by them, the parties of the second part, in terms of the directions of the trust-deed and according to law, so much of the said residue as shall be equivalent to one-third part thereof, minus the legacies and annuities bequeathed by the truster and the expenses of the Special Case incurred by both parties thereto, as such expenses shall be taxed," &c.

Counsel for Parties of First Part—R. Johnstone—Goudy. Agents—J. C. & A. Steuart, W.S.

Counsel for Parties of Second Part—Jameson—C. Johnston. Agents—Scott, Bruce, & Glover, W.S.

Thursday, February 24.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

BODDAM AND OTHERS (REID'S TRUSTEES), AND OTHERS *v.* DUCHESS OF SUTHERLAND.

Superior and Vassal—Feu-Disposition—Obligation to Relieve of Stipend—Warrandice—Teinds—Right of Redemption.

A superior in 1673 disponed lands and teinds to a vassal under warrandice to relieve him of all past and present burdens affecting the same, and "yearly and termly in all time coming of all teind-duty, minister's stipend, and annuity of teinds allenarly," and further bound himself, his heirs and successors, "that in case the teind-sheaves of the said lands, with the crofts and pertinents thereof, or any part or portion of the said teinds, should be evicted from them (the vassals) by whatsomever person or persons, or that the same lands and teinds be burdened and affected with any minister's stipend in time coming, whether present or supervenient, then and in that case, and immediately after the said eviction or burdening of the said lands and teind, as said is, to content and pay to the said A and his foresaids, in liferent and fee respective, the sum of one thousand two hundred pounds money foresaid for each chalder that should be so evicted, whether of stock or teind, with the annual-rent of the said sums yearly and termly during the not-payment thereof after the said eviction." Various augmentations were subsequently imposed on the teinds, and the successive superiors relieved the vassals of their payments of stipend until 1877, when the then superior claimed right to redeem her annual payment by a slump sum calculated at the rate of £1200 Scots per chalder of the evicted teind, in terms of the above clause. *Held* (*dub.* Lord Deas) that she was not entitled so to redeem, the said clause importing an obligation on the superior, but no right in his favour.

By disposition dated 24th January 1673, and recorded 8th April 1679, Sir George Mackenzie of Tarbet, afterwards first Earl of Cromartie, in consideration of having received from Andrew Ross of Shandwick the sum of 4708 merks, 6s. 8d. Scots money as the real price and full value of the lands and teinds to be disponed, sold, annailzied and disponed to and in favour of the said Andrew Ross and Lillias Dallas, his spouse, and longest liver of them two in liferent, and William Ross, their son, his heirs-male and assignees whatsoever, heritably and irredeemably, in fee, the said Sir George's "three-quarters of the touen and davoch lands of Drumgillie," with the pertinents thereof, "together with the teinds sheaves and parsonage teynds of the said three-quarter lands, crofts and pertinents thereof included, with the stock, and not to be separate therefrom in all time coming." The clause of tenure was as follows—"To be holden of the said Sir George Mackenzie, his heirs-male and successors, in feue and heritage for ever, for yearlie payment to them of the sume of three pounds Scots money, at two tearms in the year, Whitsunday and Martinmass, be equal halfs nomine feudi firme; together with three days' service of the tennants and possessors of the saids lands with their horses and oxen ilk year in manner following, viz., one for plowing, another for casting and leading of peats, and the third for casting and leading of divets after the accustomed manner, and they desired thereto, and als. relieving the said Sir George Mackenzie and his forsds. at the hands of our Sovereign Lord the King's most excellent Majesty, and his heirs and successors, of the number and quantity of threescore twelve bolls victuall, half bear half oatmeal, twelve shillings money silver mail, and six henns yearly, and that as the proportionable part effeirand to the sds. three-quarter lands of the whole feu-duty payable by the said Sir George Mackenzie to his Majestie in name of fue-duty for the haill davoch and lands of Drumgillie, beginand with the duty payable for the year and crop Jajvie threescore twelve years, at the tearms used and wont, and sua furth yearlie in all time comeing." The disponer Sir George Mackenzie thereafter bound himself "to exoner, releive, harmless and skaithless keep, the said Andrew Ross, his sd. spouse, their said son, and